

**STATE WATER RESOURCES CONTROL BOARD
BOARD MEETING SESSION – ADMINISTRATIVE HEARINGS OFFICE
SEPTEMBER 21, 2021**

ITEM 2

SUBJECT

CONSIDERATION OF PROPOSED ORDER PREPARED BY THE ADMINISTRATIVE HEARINGS OFFICE (AHO) ON THE DRAFT CEASE-AND-DESIST ORDER (DRAFT CDO) AND ADMINISTRATIVE CIVIL LIABILITY COMPLAINT (ACL COMPLAINT) ISSUED BY THE DIVISION OF WATER RIGHTS ENFORCEMENT SECTION (ENFORCEMENT SECTION) AGAINST RESPONDENT KEVIN GONZALVES FOR UNAUTHORIZED DIVERSIONS OF WATER FROM CANAL CREEK IN MERCED COUNTY

DISCUSSION

Background

As shown in Figures 1 and 3 to the proposed order, Canal Creek is located in Merced County and flows generally parallel to, and south of, the Merced River. There is little or no natural flow in Canal Creek during the summer. The Merced Irrigation District (Merced ID) diverts water from the Merced River through its Main Canal and releases some of that water into Canal Creek and Edendale Creek. Most of this released water flows down Canal Creek past Respondent's property. Castle Dam, a flood-control facility constructed by the U.S. Army Corps of Engineers in 1991-1992 and now operated by the Central Valley Flood Protection Board, regulates Canal Creek flows and sometimes causes water to back up on to Respondent's property.

Figure 2 to the proposed order depicts Respondent's property. Evidence submitted during the hearing indicates that Respondent's father excavated the land that became the Gonzalves Pond in 1995 to obtain a supply of dirt to construct a berm to protect Orchard 1 on Respondent's property from water backing up behind Castle Dam.

Respondent historically received irrigation water from Merced ID's Escaladian Canal Lateral 7. In the early summer of 2015, Respondent's neighbor cut the Lateral 7 pipe, which terminated Respondent's ability to receive water from that supply. Respondent began pumping water from the Gonzalves Pond in August 2015 to irrigate his orchards. The pumping induced additional water to flow from Canal Creek into the Gonzalves Pond.

Respondent did not have any authorization from Merced ID to pump water from the Gonzalves Pond for irrigation until August 28, 2017, when Merced ID issued a temporary pumping permit to Respondent. The proposed order concludes that Respondent pumped approximately 92 acre-feet of water from the pond between August 2015 and August 2017 without any legal authorization.

In 2020, Respondent installed a new pipeline (Gonzalves Lateral A shown on Figure 2) that conveys water from Merced ID's Escaladian Canal to Respondent's property. Now that he has this new water supply, he no longer pumps water from the Gonzalves Pond.

Draft CDO, ACL Complaint and AHO Hearing

In November 2019, the Enforcement Section issued the Draft CDO to Respondent. In May 2020, the Division of Water Rights issued the ACL Complaint to Respondent. Respondent requested hearings on both documents.

Water Code section 1112, subdivision (a), provides that, subject to some exceptions not applicable here, an AHO hearing officer shall preside over hearings on Draft CDOs and ACL complaints in water-right matters. The AHO held a hearing on various days in July and September 2020 and conducted a site visit in August 2020. The AHO then prepared and circulated a draft proposed order, and the parties submitted comments.

Proposed Order

The AHO transmitted its final proposed order to the Clerk of the Board on July 14, 2021.

The proposed order rejects Respondent's argument that the waters that back up from Castle Dam on to his property are "floodwaters" that he may divert without a water right, and his argument that he may divert water from Canal Creek for irrigation purposes under riparian rights. The proposed order concludes that Respondent does not have any water rights that authorize him to pump water from the Gonzalves Pond or Canal Creek for irrigation purposes. The proposed order therefore contains a cease-and-desist order, which would prohibit Respondent from such pumping unless Merced ID authorizes it. The proposed order would require Respondent to prepare and file an amended initial Statement of Water Diversion and Use, and amended supplemental statements, that are consistent with the order.

The proposed order concludes that the Gonzalves Pond has become a natural condition, and that, for water-right purposes, the pond should be treated as part of the Canal Creek channel. This conclusion follows the California Supreme Court's decision in *Chowchilla Farms v. Martin* (1933) 219 Cal. 1 and the State Water Board's water-right Decision 1618 (1988). As a result, Respondent does not need any water right for the flows of water from Canal Creek into the pond, the temporary detention of water in the pond, or any in-pond uses of the water. Respondent does need a water right, or authorization from Merced ID, for any diversions of water from the pond for irrigation or other purposes of use.

Consistent with the conclusion that the Gonzalves Pond is a natural condition, the proposed order requires Respondent to maintain the pipes that allow water to flow between Canal Creek and the pond free from any obstructions. If the Army Corps of Engineers, the Central Valley Flood Protection Board or some other entity takes some action based on flood-control requirements or property rights that prevents Respondent from maintaining these pipes, then the proposed order requires Respondent to work with the Enforcement Section to develop an alternative maintenance plan.

The proposed order concludes that administrative civil liability (ACL) of \$45,000 should be imposed on Respondent for his unauthorized diversions of water from the Gonzalves Pond for irrigation purposes. Of this amount, \$25,000 would be due immediately and the remaining \$20,000 would be suspended if Respondent complies with the provisions of the cease-and-desist order that require immediate actions. The proposed order concludes these amounts are appropriate after considering the relevant ACL factors.

The primary factors supporting substantial ACL are: (a) Respondent's unauthorized diversions persisted for over two years, most of which was during extreme drought conditions; and (b) Respondent and his attorney repeatedly made clearly incorrect factual allegations and legal arguments that required the Enforcement Section to incur substantial investigation costs.

The primary factors that militate against substantial ACL are: (a) because Respondent ended up paying Merced ID for the water he pumped from the Gonzalves Pond during August 2015 through August 2017 at rates that far exceeded the district's rates for normal water deliveries (Respondent paid Merced ID \$154,987 for water for which the district normally would have charged \$8,817), the district was not harmed by, and received a significant economic benefit from, Respondent's unauthorized diversions; (b) for the same reason, Respondent did not receive any economic benefit from, and instead experienced significant economic impacts from, these diversions; and (c) Respondent took significant corrective actions before the hearing by obtaining a temporary pumping permit from Merced ID in August 2017 and by constructing and starting to use Gonzalves Lateral A in 2020.

Appendix A to the proposed order briefly discusses the parties' comments on the AHO's draft proposed order and responds to these comments.

POLICY ISSUE

Should the State Water Board adopt the Proposed Order?

FISCAL IMPACT

The activity is budgeted within existing resources and no additional fiscal demands will result from adoption of the Proposed Order.

REGIONAL BOARD IMPACT

None.

STAFF RECOMMENDATION

The AHO recommends that the State Water Board adopt the proposed